(1)

90-1042

No. 90-

In The

Supreme Court of the United States

October Term, 1990

CAPTAIN GROVES; ROBERT J. FLANAGAN; DAVID R. MACKAY; ROBERT I. CASSADY; FRANK TERRY; RICHARD T. CENZANO; DONALD B. WAWRZASZEK, and TROY WEST

Petitioners,

v.

GILBERT HOSTLER

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the court below erred in holding that a pro se prisoner's notice of appeal in a 42 U.S.C. § 1983 action is deemed filed under Federal Rules of Appellate Procedure 4(a)(1) at the moment the prisoner delivered the notice to prison authorities for forwarding to the district court. More specifically, did the court err in extending the holding in Houston v. Lack, 487 U.S. 266 (1988) from habeas corpus cases to 42 U.S.C. § 1983 actions?

LIST OF PARTIES

All the parties are listed in the caption of this case.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit filed August 30, 1990 is reported at 912 F.2d 1158 and reprinted in the Appendix here at pages A-1 through A-16, infra. The District Court's order granting petitioner's motion for summary judgment is unreported. It is reproduced here together with the magistrate's recommendation in the Appendix at pages A-17 through A-41.

JURISDICTION

The decision and opinion of the Court of Appeals were filed on August 30, 1990. This petition for writ of certiorari is filed on November 28, 1990, within ninety (90) days of August 30, 1990.

This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions involved are set out verbatim at A-42 through A-43 in the Appendix. They are: United States Constitution, Fifth Amendment and Fourteenth Amendment Section One.

STATEMENT OF THE CASE

A. Facts and Proceedings leading to the District Court action

Gilbert Hostler is a prisoner in the custody of the Arizona Department of Corrections (ADOC).

On June 4, 1984, Hostler was charged with violating institutional Rule Group II, 1, ". . . escape, attempted escape, aiding and abetting to prevent the discovery and escape."

On June 6, 1984, a preliminary hearing was held which resulted in Hostler being formally charged by the coordinator of discipline. Pursuant to disciplinary rules, Hostler was allowed to summon witnesses on his behalf and to request an inmate representative to represent him at the hearing.

Three extensions of the hearing date

were granted pursuant to A.A.C. R5-1-603(C)(3)(b) by appeals Officer Troy West upon a showing of good cause.

A hearing was held on August 31, 1984 and Office Froebe of the Investigations and Intelligence Unit testified that based upon confidential information she received, Hostler was involved in an escape attempt. The confidential information was corroborated with the findings of tools in an escape tunnel and description by the informant.

Hostler was present at the hearing and represented by another inmate. Hostler was permitted to question Officer Froebe regarding her testimony. Hostler was not allowed to call correctional Officer Heliotes as a witness because the committee chairman

determined that Hostler's representative was trying to establish the identity of the informant.

Hostler was found guilty by the disciplinary committee and sentenced to ten (10) days in disciplinary isolation and thirty (30) days loss of privileges. As part of the penalty, the committee recommended to the director that 450 days of Hostler's earned goodtime credits be forfeited. Hostler was also referred to the reclassification committee and subsequently placed in administrative segregation.

On January 2, 1985, Hostler filed the instant pro se civil rights action in the federal district court pursuant to 42 U.S.C. § 1983. Federal jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and

1343(a)(3). The suit sought both injunctive relief and monetary damages.

B. Proceedings in the District Court

Hostler's § 1983 action in the District Court seeks injunctive relief and monetary damages against the three members of the disciplinary committee, the three members of the classification committee, the appeals officer, Troy West, and the Warden, Donald B. Wawrzaszek. The complaint alleges violations of federal due process rights.

On March 12, 1985, defendants filed a motion to dismiss. On April 5, 1985, Hostler filed a response to defendants' motion to dismiss, and a motion to strike. On October 1, 1985, the Magistrate issued a report and recommendation recommending that

defendants be granted partial summary judgment with respect to the issues raised in Hostler's special action filed in the Arizona Supreme Court regarding good time. In spite of opposition, on January 28, 1986, the District Court ordered that the Magistrate's report and recommendation be adopted and defendants were granted partial summary judgment.

On February 12, 1986, Hostler filed a notice of appeal from the partial summary judgment. On May 8, 1986, defendants filed a motion for summary judgment on the remaining issues and an accompanying statement of facts. On June 10, 1986, Hostler responded to the motion for summary judgment. On June 27, 1986, defendants replied. After supplemental materials were filed, the Magistrate filed a recommendation on

September 9, 1986, with respect to defendants' motion for summary judgment. After objections, on February 12, 1987, the District Court ordered the defendants to file a tape of the disciplinary hearing held August 31, 1984, along with a copy of any exhibits received in evidence at the hearing. Defendants complied with this order and on June 1, 1987, the District Court adopted the Magistrate's recommendation, as supplemented by memorandum, and granted defendants' summary judgment motion. Judgment dismissing the action was entered on June 1, 1987.

On July 6, 1987, Hostler filed a "Motion for Relief from Judgment," together with a Notice of Appeal and a cover letter with instructions to the Clerk of the district court. Hostler's

motion, notice of appeal and cover letter were dated June 29, 1987, prior to the July 1, 1987 deadline for a timely notice of appeal. The accompanying envelope bore a postmark of July 3, 1987. On April 27, 1988 the district court entered an order denying Hostler's motion for reconsideration.

C. Proceedings in the Court of Appeals

Neither party raised the issue of the jurisdiction of the Court of Appeals. The Court of Appeals considered the question of whether Hostler's notice of appeal had been timely filed sua sponte.

The Ninth Circuit relied upon Houston v. Lack, 487 U.S. 266 (1988), to hold that a pro se prisoner's notice of appeal from an adverse judgment in a 42

U.S.C. § 1983 action was deemed filed at the moment the prisoner delivered the notice to prison authorities for forwarding to the district court. However, it could not be established from the record when Hostler submitted his notice of appeal to prison authorities. Relying upon Miller v. Sumner, 872 F.2d 287 (9th Cir. 1989), the Court of Appeals remanded the case to the district court for a determination of whether Hostler delivered his notice of appeal to prison authorities before July 1, 1987.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE COURT OF APPEALS ERRED IN EXTENDING THE REASONING OF Houston v. Lack TO HOLD THAT A PRO SE PRISONER'S NOTICE OF APPEAL IN A 42 U.S.C. § 1983 ACTION IS DEEMED FILED AT THE MOMENT THE PRISONER DELIVERED THE NOTICE TO PRISON AUTHORITIES FOR FORWARDING TO THE DISTRICT COURT.

In Houston v. Lack, 487 U.S. 266 (1988), this Court held that a pro se prisoner's notice of appeal in a habeas corpus action under 28 U.S.C. § 2254 was filed at the time the prisoner delivers the notice to prison authorities for mailing. The majority in Houston reasoned that there was nothing in the applicable rules to compel the conclusion that, in all cases, receipt by the clerk of the district court is the moment of filing.

The Houston majority further reasoned that the moment at which pro se

prisoners necessarily lose control over their notices of appeal is at delivery to prison authorities, not receipt by the clerk. Therefore the justification for the general rule, that a civil litigant who chooses to mail a notice of appeal assumes the risk of untimely delivery and filing, was not applicable. A pro se prisoner has no choice but to hand his notice of appeal over to prison authorities for forwarding to the court clerk.

The Houston majority also reasoned that "the pro se prisoner does not anonymously drop his notice of appeal in a public mailbox-he hands it over to prison authorities who have well-developed procedures for recording the date and time at which they receive papers for mailing and who can readily

dispute a prisoner's assertions that he delivered the paper on a different date. Because reference to prison mail logs will generally be a straightforward inquiry, making filing turn on the date the pro se prisoner delivers the notice to prison authorities for mailing is a bright line rule, not an uncertain one." Houston, 487 U.S. at 275.

While the important liberty interests at stake in a habeas corpus action may justify the holding in Houston v. Lack, that rationale should not be extended to all the various interests that can be asserted in 42 U.S.C. § 1983 actions.

By remanding the case for a further evidentiary hearing, the Court of Appeals' opinion has the undesirable effect of multiplying litigation. The

impact on the already strained federal courts is obvious. A similar impact on state courts could also be expected, because state courts are often guided by the interpretation of the federal procedural rules similar to their own.

The bright line rule followed in Houston assumes that prison authorities record the date and time at which they receive papers for mailing so that reference to prison mail logs will generally be a straightforward inquiry. In the present case, there is nothing in the record to indicate whether there is any prison mail log. If there is no prison mail log, then the underpinnings for the bright line rule are swept away. It is doubtful that someone other than the prisoner would be able to recall the date on which a particular

prisoner mailed a particular document over 3 years ago. The prisoner has every incentive to recall the date of mailing as June 29, 1987, regardless of whether that was true.

As was the case in Houston, this case is governed by 28 U.S.C. § 2107 which sets a statutory, jurisdictional deadline for the filing of notices of appeal in civil actions. It requires the notice of appeal to be filed within 30 days after the entry of the judgment. The definition of the term "filed" is provided by Federal Rules of Appellate Procedure 3(a) and 4(a)(1). Those rules require the notice of appeal to be filed with the clerk of the district court within the 30 day period. Only then does the Court of Appeals have jurisdiction.

The dissenting opinion in Houston noted that the decision of the majority abandoned the highly desirable unitary interpretation of "filed" in favor of a definition that varies with the circumstances. The dissent correctly predicted that such a relaxation of the filing rule would invite jurisdictional uncertainties in many other contexts. The present case is such an example. Further possibilities are suggested in the dissent in Houston.

"Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. 'Any less rigid standard would risk

encouraging a lax attitude toward filing dates,' United States v. Boyle, 469 U.S. [241,] 249 [105 S.Ct. 687, 691-692, 83 L.Ed.2d 622] [(1985)]. A filing deadline cannot be complied with, substantially or otherwise, by filing late--even by one day." United States v. Locke, 471 U.S. 84, 100-101, 105 S.Ct. 1785, 1796, L.Ed.2d 64 (1985), cited in dissenting opinion in Houston, 487 U.S. at 282.

CONCLUSION

This case cries out for this Court's review. The Court of Appeals erred in extending the reasoning of Houston v. Lack to hold that a pro se prisoner's notice of appeal in a 42 U.S.C. § 1983 action is deemed filed at the moment the prisoner delivered the notice to prison authorities for forwarding to the district court. The important liberty interests at stake in a habeas corpus action do not support the extension of Houston v. Lack to 42 U.S.C. § 1983 actions. This case represents the next logical step in the opening of the litigation floodgates. If the amorphous rule of Houston v. Lack is extended, it will immerse the courts and prison officials in a host of ancillary factual hearings regarding internal prison mail

practices and recordkeeping. Outside of the habeas context, there is simply no sound legal or policy reasoning for blurring the term "filed" and abandoning the certainty provided by appellate procedure rules 3(a) and 4(a)(1).

Petitioners respectfully pray for the grant of this writ. While this Court has the authority to amend the Federal Rules of Appellate Procure, the lower courts should not be allowed to amend the rules in the context of deciding specific cases.

RESPECTFULLY SUBMITTED.

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November 28, 1990
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APPENDIX

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APPENDIX A

GILBERT HOSTLER,
Plaintiff-Appellant,

v.

Captain GROVES; Robert J. Flanagan; David R. Mackay; Robert I. Cassady; Frank Terry; Richard T. Cezanc; Donald B. Wawrzaszek; Troy West,
Defendants-Appellees.

No. 88-2734.

United States Court of Appeals,
Ninth Circuit.

Appeal from the United States District Court for the District of Arizona
Earl H. Carroll, District Judge, Presiding
D.C. No. CV-85-3-EHC

Submitted February 7, 1990*
San Francisco, California.

Filed August 30, 1990.

Before Herbert Y.C. CHOY, David R. THOMPSON and Stephen S. TROTT, Circuit Judges.

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

TROTT, Circuit Judge:

Gilbert Hostler, an incarcerated prisoner, appeals pro se the district court's grant of summary judgment to appellees, various prison officials, in this 42 U.S.C. § 1983 action. We remand for a determination of whether Hostler timely submitted his notice of appeal to prison authorities for forwarding to the district court:

PROCEDURAL BACKGROUND

The district court entered its final judgment on June 1, 1987. In a letter dated June 29, 1987, Hostler wrote to the Clerk of the district court:

> Enclosed you will find a Notice of Appeal for the above-referenced cause; however, earlier this morning I submitted a Motion for Relief from Judgment in the same case.

> The Federal Rules of Civil Procedure [sic] the Local Rules provide for the filing of a Notice of Appeal after a Motion for Relief from Judgment pursuant to Rule 60(b), F.R.C.P. has been ruled on in the event the Court does not rule on the Motion for Relief from Judgment until after the 30 day time limit--for filing a notice of appeal--has expired.
>
> It is my wish that the Motion for Relief from Judgment be heard; however, not at the risk of losing my right to appeal. If the Notice of Appeal can be "Lodged" pending the outcome of the Motion for Relief from Judgment without causing the Notice of Appeal to be untimely filed, then please do so. Otherwise, I want the Notice of Appeal filed in a timely manner, regardless of the outcome of the Motion for Relief from Judgment.

The accompanying envelope bears a postmark of July 3, 1987[1/]. In his "Motion for Relief from Judgment," also

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1/ Hostler sent a copy of this letter to the district court judge. The envelope accompanying the copy also bears the postmark of July 3, 1987.

dated June 29, 1987, Hostler argued that the district court misconstrued pertinent case law and made mistaken factual findings.

Hostler's Notice of Appeal was "lodged" on July 6, 1987. In a letter dated July 8, 1987, the Clerk wrote to Hostler: "Please be advised that your Notice of Appeal was received and lodged on July 6, 1987 pending disposition of your Motion for Relief from Judgment." The district court denied Hostler's motion for reconsideration in an order entered on April 27, 1988. In a letter dated May 4, 1988, Hostler wrote to the Clerk requesting that his Notice of Appeal be filed. Hostler's Notice of Appeal was filed on May 9, 1988.

[1] Although neither party raised the issue of whether we have jurisdiction over this appeal, we must address the question sua sponte. United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265, 1267 (9th Cir. 1985).

1. Date of Filing

[2] Federal Rule of Appellate Procedure 4(a)(1) requires that notices of appeal "be filed with the clerk of the district court within 30 days after the date of entry of the judgment." Fed.R.App.P. 4(a)(1); see also 28 U.S.C. § 2107 (1988). Motions brought under Federal Rules of Civil Procedure 60(b) do not toll the time for filing a notice of appeal. Rule 60(b) specifically provides: "A motion under this subdivision (b) does not affect the

finality of a judgment or suspend its operation." Fed.R.Civ.P. 60(b). Thus, the Clerk erred in believing that Hostler could wait to file his notice of appeal until after the court decided appellant's Motion for Reconsideration.[2/] In light of Hostler's express direction to the Clerk and his pro se status, however, we conclude that we may deem the notice of appeal filed as of the date it was lodged with the district court.

2/ Motions brought under Fed.R.Civ.P. 52(b) (to amend or make additional findings of fact) or under Fed.R.Civ.P. 59(e) (to alter or amend judgment) do toll the time for filing notices of appeal. Fed.R.App.P. 4(a)(4). Appellant's motion could not have been considered a Rule 52(b) or a Rule 59(e) motion, however, because it was not made within ten days of entry of judgment. See Fed.R.Civ.Pro. 52(b); 59(e).

2. Applicability of Houston v. Lack

[3] Deeming the notice of appeal filed as of the date it was lodged will not benefit Hostler, however, if he did not timely submit the documents to the Clerk in the first place. Under Federal Rule of Appellate Procedure 4(a)(4), Hostler was required to submit his notice of appeal by or on July 1, 1987. Although Hostler's motion for reconsideration and notice of appeal were dated June 29, 1987, they were not received by the Clerk until July 6, 1987. As mentioned above, envelopes accompanying the letter and notice of appeal bore postmarks of July 3, 1987.

In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that under Rule 4(a)(1) a pro se prisoner's notice of appeal from denial of a

petition for habeas corpus was deemed filed at the moment the prisoner delivered the notice to prison authorities for forwarding to the district court. See Miller v. Sumner, 872 F.2d 287, 288 (9th Cir. 1989), dismissed after remand, No. 88-1798, slip op. at 8509 (9th Cir. Aug. 8, 1990) ("For the exception to filing requirements for pro se prisoner appeals to apply, the notice must be posted through the prison log system.")

a. Application to Non-habeas Cases

[4] The opinion in Houston gives no indication that its holding should be limited to habeas cases. The Court noted that a pro se prisoner cannot personally monitor the processing of a notice of appeal and "has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he

cannot control or supervise and who may have every incentive to delay." 487 U.S. at 271. The Court also noted that a prisoner has no means of proving that a delay may have been the fault of prison authorities, as "[t]he prison will be the only party with access to at least some of the evidence needed to resolve such questions . . . and evidence on any of these issues will be hard to come by for the prisoner confined to his cell, who can usually only guess whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay." Id. at 276.

Pro se prisoners experience similar difficulties in filing appeals from non-habeas civil suits. In fact, prison authorities would have greater incentive

to delay the processing of section 1983 suits, since such suits often target prison officials. The only circuit that has faced this question has assumed, without analysis, that Houston applies to non-habeas civil suits. See Smith v. White, 857 F.2d 1042, 1043 (5th Cir. 1988); cf. Dunn v. White, 880 F.2d 1188, 1190 (10th Cir. 1989) (citing Houston, court deemed objections to magistrate's report in section 1983 case timely since timely mailed from prison), cert. denied, 110 S.Ct. 871 (1990). Given the broad language of Houston and its important policy concerns, we conclude that Houston applies to notices of appeal filed in non-habeas civil cases by incarcerated prisoners acting pro se.

b. Retroactivity

[5] This circuit has not directly addressed whether Houston should be applied retroactively. In Miller v. Sumner, 872 F.2d at 287, where the untimely filing occurred prior to the decision in Houston, the panel apparently assumed that Houston would apply retroactively. Specifically, the panel stated that if the district court determined the appellant had timely delivered his notice of appeal, the district court should issue a statement of probable cause: "Only then will we have jurisdiction over this appeal." 872 F.2d at 289.[3/] We now confirm

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3/ In the only other Ninth Circuit case applying Houston, the panel expressly stated that it did not have to reach the issue of whether Houston should be applied retroactively. United States v. Angelone, 894 F.2d 1129, 1131 (9th Cir. 1990).

that Houston will be applied retroactively.

"[A] fundamental principle of our jurisprudence is that a court will apply the law as it exists when rendering its decision." Degurules v. INS, 833 F.2d 861, 863 (9th Cir. 1987); Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974); see also Reed v. Hoy, 891 F.2d 1421, 1424 (9th Cir. 1989), amended, No. 87-4324, slip op. at 7655 (9th Cir. July 18, 1990) (decision reformulating federal civil law will ordinarily be applied retroactively).

Under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), a court determining whether to apply a decision retroactively must consider: "(1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or

retard the purposes of the rule in question; and (3) whether applying the new decision will produce substantial inequitable results." Rivera v. Green, 775 F.2d 1381, 1383 (9th Cir. 1985), cert. denied, 475 U.S. 1128 (1986); see also Reed, 891 F.2d at 1424-25.

It if fair to say that Houston established a new principle of law. See Houston, 487 U.S. at 274 (acknowledging "general rule in civil appeals" that notice is not filed upon merely placing it in the mail to clerk); Allen v. Schnuckle, 253 F.2d 195, 197 (9th Cir. 1958). However, retroactive operation would further Houston's underlying policy of not penalizing pro se prisoners who timely deliver notices of appeal to prison authorities for delays over which they have no control. In

addition, retroactive application of Houston would not produce substantial inequitable results. Cf. Krug v. Imbordino, 896 F.2d 395, 397 (9th Cir. 1990) (where intervening case lengthens statute of limitation period for filing section 1983 complaint, case will be applied retroactively); Marks v. Parra, 785 F.2d 1419, 1419-20 (9th Cir. 1986) (same); Rivera v. Green, 775 F.2d at 1383-84 (same; noting importance of access to courts for section 1983 litigants and disfavored nature of statute of limitation defense). On balance, we conclude that these factors weigh in favor of retroactive application of Houston.[4/]

c. Necessity of a Remand

[6] In Miller v. Sumner, we held that where the court had no record of when the appellant delivered the notice

to prison authorities, "the proper course was to remand to the district court for a determination of whether the notice of appeal was delivered to prison authorities on time." 872 F.2d at 289. The court stated that a presumption of timeliness "would encourage prisoners to fraudulently backdate notices of appeal whereas a presumption of untimeliness "would encourage prison officials, who often are the appellees in these suits, to delay mailing notices of appeal." Id. Miller applies here, as we do not know when Hostler submitted his notice of appeal to prison authorities for forwarding to the Clerk.

4/ We note that the Fifth Circuit has assumed, without analysis, that Houston applies retroactively. Smith v. White, 857 F.2d at 1042; cf. Smith v. Evans, 853 F.2d 155, 161-62 (3d Cir. 1988) (applying Houston retroactively to untimely Rule 59(e) motion).

CONCLUSION

In light of Hostler's express instructions to the Clerk and his pro se status, we presume that his notice of appeal was filed as of the date it was lodged in the district court. However, if he did timely submit the notice to prison authorities for forwarding to the district court, then under Houston v. Lack we would consider his appeal to be timely.

On remand, the district court shall determine whether Hostler delivered his notice of appeal to prison authorities before July 1, 1988. if so, the appeal shall be permitted. This panel will retain assignment of this case.

REVERSED and REMANDED for further proceeding consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GILBERT HOSTLER, Plaintiff,	)	CIV 85-0003 PHX EHC
v.	)	MEMORANDUM AND ORDER
CAPTAIN GROVES, et al., Defendants.	)	

Plaintiff, an inmate at the Arizona State Prison Complex, Florence, Arizona filed this pro se complaint pursuant to 42 U.S.C. § 1983, alleging a denial of due process and equal protection in connection with a prison disciplinary hearing and penalties assessed against him as result of that hearing. The reason for defendants subjecting plaintiff to disciplinary proceedings

was their determining that he participated in a prison escape effort.

By a previous order, dated January 23, 1986, summary judgment in favor of defendants was granted respecting the disciplinary committee's determination with regard to the forfeiture and earning of good time credits by plaintiff. The Order referred the remaining issues to the United States Magistrate for a recommendation.

Thereafter defendants moved for summary judgment as to the remaining issues. The motion was fully briefed and the Magistrate made a recommendation with respect to defendants' motion, to which the plaintiff has responded. As a result of this process this Court ordered defendants to file additional evidence consisting of an investigation report relating to the disciplinary

charges against plaintiff and a copy of the audio recording of the disciplinary hearing itself. This evidence has been received and reviewed, as have plaintiff's contentions concerning that evidence. Defendants' motion, therefore, is ready for disposition.

Plaintiff's claims against defendants are essentially two-fold. First, that the manner in which correctional personnel conducted the disciplinary proceedings deprived plaintiff of state-created protected liberty interests, citing Hewitt v. Helms, 459 U.S. 460 (1983). Second, that the committee failed to receive adequate evidence upon which to base its decision, citing Kyle v. Hanberry, 677 F.2d 1386 (11th Cir. 1982).

Plaintiff relies upon procedures set forth in the Disciplinary Rules for the

Arizona Department of Corrections as providing to him state-created liberty interests. See, e.g., ARIZ. COMP. ADMIN. R. & REGS. 5-1-603 (1984). The Ninth Circuit has held that "[b]efore [it] will recognize a constitutionally protected liberty interest, state law must direct that a given action will be taken or avoided only on the existence or nonexistence of specified substantive predicates." Toussaint v. McCarthy, 801 F.2d 1080, 1094 (9th Cir. 1986). With respect to the Arizona Department of Correction's Disciplinary Rules, the Ninth Circuit has previously held that the regulations found at R5-1-201 to 5-1-607 do not "contain the 'mandatory language' found to be controlling in Helms." McFarland v. Cassady, 779 F.2d 1426, 1428 (9th Cir. 1986).

Accordingly, plaintiff's reliance on the correctional disciplinary rules as a source of constitutionally protected rights is misplaced.

Additionally, the regulation upon which plaintiff primarily relies, R5-1-603(B), contains language giving correctional personnel discretion where security considerations are implicated, see, e.g., R5-1-603(B)(1) ("unless security considerations dictate otherwise"), thus further negating the plaintiff's contention that "[t]he State, through its Administrative Code of Rules and Regulations - R5-1-603, et seq. -- have undoubtedly created a protected interest in the [procedures contained therein]." Objections to Magistrate's Recommendations at 3 (filed Sept. 9, 1986). Further, as the Court in Hewitt noted, "[p]rison administrators

. . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 459 U.S. at 472, quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979).

Federal courts ordinarily should not attempt to second guess prison official's judgments as to proper investigative procedures and the notice to the inmate which should accompany a security investigation. Pell v. Procunier, 417 U.S. 817, 827 (1974) (unless there is "substantial evidence" prison officials "have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters"); see also

Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (rights retained by inmates are "subject to restrictions imposed by the nature of the regime to which they have been lawfully committed"). Plaintiff has not presented evidence that defendants, in interpreting and following their disciplinary rules, over-reached the discretion which is afforded them.

Nor has plaintiff established that the notice of hearing and hearing findings given him by the authorities in this instance were not in compliance of the standards established by the Supreme Court in Wolff v. McDonnell, 418 U.S. at 564 - 65. Plaintiff was timely given adequate notice of the charges against him so as to allow him to prepare a defense, and upon conclusion of the proceedings, a written decision was

entered stating the evidentiary basis of the decision.

The plaintiff having failed to show any federal constitutional rights were violated regarding the notice, timing and reporting of the disciplinary proceedings, this Court may not, as a matter of law, instruct state prison officials as to how to conform their conduct to state law. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

Plaintiff's claim that he was not allowed to call a necessary witness is also without merit. A review of the audio tape of the disciplinary hearing reveals plaintiff's reason for wishing to call the witness and the committee's reason for denying plaintiff the opportunity to do so.

At the hearing plaintiff indicated there were a number of inmates who wished to transfer out of the cellblock he was assigned to at the time of the attempted escape. Plaintiff's position was that the confidential informant who advised prison officials of the escape attempt was one of those individuals, and in order to secure a transfer added plaintiff's name to the list of inmates participating in the escape attempt. The inclusion of his name, plaintiff argued, was not based on his participation in the plot but rather to maximize the favor informing would garner.

The witness plaintiff sought to call was the correctional officer who handled transfer requests. The disciplinary committee refused to allow plaintiff to call this witness, finding that to do so

would place those individuals requesting a transfer in danger as possible informants and thus threatening institutional security. This determination was well within the authority of committee. Wolff, 418 U.S. at 566.

Plaintiff also challenges the adequacy of the evidence relied upon by the committee to convict him of a disciplinary violation. That evidence, the "Reporting Officer['s] Report and Testimony," is sufficient to sustain the disciplinary conviction. Superintendent, Mass. Correctional Inst. v. Hill, 105 S.Ct. 2768, 2774-75 (1985) ("requirements of due process are satisfied if some evidence supports the decision;" finding that "evidence in the form of testimony from the prison guard and copies of his written report" were

sufficient evidence). While the audio tape of the hearing reveals the evidence as to plaintiff's involvement in the escape plot might be "meager," the committee's findings were not without support or otherwise arbitrary. Thus, those findings are not constitutionally infirm. Id. at 2775.

The committee heard the investigating officer's testimony that she had information not only from her initial confidential informant, but also from other inmates (obtained on the second day of the investigation) that plaintiff was involved in the escape attempt. That the officer and committee did not go into great detail about what the inmate informants revealed with respect to the plaintiff is understandable in that such testimony could also reveal the identity of the

informants. Kyle v. Hanberry, 677 F.2d 1386, 1390 (11th Cir. 1982) ("because a prison needs informants in order to maintain a system of order, an institution must protect those who accuse their fellow inmates"). Thus, the committee need only have presented to it some information from which it can reasonably conclude, "to its satisfaction," that the informant was reliable. Id.

The investigating officer testified that her initial informant was an inmate who had reliably provided information to her in the past and that his information, especially as regards the escape tunnel, was confirmed by her own investigation. Id. See also Illinois v. Gates, 462 U.S. 213 (1983) (no rigid test is to be applied to verification of informant's tips, relying instead on a

totality-of-the circumstances analysis). And, though the officer's report was first presented to the committee members at the hearing, that does not diminish their right to rely upon it. Cf. Wolff, 418 U.S. at 556 (disciplinary proceedings are not held to standards as criminal prosecutions). Accordingly, plaintiff's challenges to the evidence upon which the disciplinary committee relied are without merit.

Therefore,

IT IS ORDERED adopting the Magistrate's Recommendation, as supplemented by the above memorandum, and granting defendants' motion for summary judgment, and directing the Clerk of Court to enter judgment accordingly.

IT IS FURTHER ORDERED denying plaintiff's request for disclosure of

the Investigation Report filed with Court March 2, 1987 and directing the Clerk of Court to file such report under seal.

DATED: May 29, 1987.

/s/ Earl H. Carroll
EARL H. CARROLL
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GILBERT HOSTLER, Plaintiff, v. CAPTAIN GROVES, et al., Defendants.	NO. CIV 85-3 PHX EHC (MM) RECOMMENDATION

TO THE HONORABLE EARL H. CARROLL, U. S. DISTRICT JUDGE.

On January 2, 1985, plaintiff was granted leave to file a pro se complaint pursuant to 42 U.S.C. § 1983. Plaintiff alleges a denial of due process and equal protection in connection with a disciplinary hearing and penalties assessed. Defendants filed a Motion to Dismiss. On October 1, 1986, the

Magistrate filed a Recommendation concerning the Motion to Dismiss. The Recommendation includes the factual background for plaintiff's claims which will not be repeated here. On January 23, 1986, the Court adopted the Magistrate's Recommendation and granted partial summary judgment on behalf of defendants regarding the issues of forfeiture and the earning of good time credits.

On May 8, 1986, defendants filed a Motion for Summary Judgment on the remaining issues. Plaintiff filed a response, and defendants replied to the response. On July 15, 1986, plaintiff filed a supplemental response and defendants responded on July 16, 1986. Plaintiff's supplemental response asserts that defendants are barred from relitigating issues by their failure to

object to the Magistrate's first Recommendation. Since defendants raise new issues in their Motion for Summary Judgment, this argument is without merit. The issues which remain for consideration concern notice of charges, use of confidential information, refusal to permit testimony of a witness, extensions of time for the disciplinary hearing, and adequacy of the statement of decision.

I. Notice of Charges

Plaintiff alleges the notice he received was not timely and was not adequate to allow him to prepare his defense. Plaintiff assets the notice did not comply with time requirements set forth in A.C.R.R. R5-1-603. A federal court shall not grant relief against state officials based upon their failure to conform to state law.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Due process requires a prisoner be given notice of an alleged violation twenty-four hours in advance of the disciplinary hearing. Wolff v. McDonnell, 418 U.S. 539, 945 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Plaintiff admits the notice met with the Wolff requirments.

Plaintiff also contends the notice was inadequate. Notice is required to give the accused a chance to prepare his defense. Wolff, 418 U.S. at 564, 94 S.Ct. at 2979, 41 L.Ed.2d at 956. In determining what due process requires in this context, the Court analyzed policy considerations finding that it would be unwise to encase the disciplinary procedures in an "inflexible constitutional straightjacket;"

procedures should reasonably "accommodate the interests of the inmates and the needs of the institution." Id. at 563, 572, 94 S.Ct. at 2978, 2982, 41 L.Ed.2d at 955, 960. The notice received by plaintiff stated that he "is implicated in an Escape Attempt from CB #2 via existing tunnels under CB #2 and on out past the steam plant." The notice listed five other inmates involved, stated the investigation was based on confidential information, and stated that evidence included tools and pictures. In consideration of the circumstances presented, which included an escape attempt which was never completed and the use of confidential information, this notice provided sufficient information to apprise plaintiff of the charges and enable im to prepare his defense. The notice of

charges provided plaintiff in this matter comported with the requirements of due process.

II. Confidential Information

Plaintiff challenges the use of information from a confidential informant, alleging the disciplinary committee did not determine the reliability of the informant. Even if an inquiry into the reliability and credibility of the confidential informant is constitutionally required, the committee received testimony concerning the informant's reliability in plaintiff's case. Investigator Froebe swears in her affidavit that she testified before the committee that the informant had provided reliable information in the past and that her investigation confirmed in detail the information provided by the informant.

Plaintiff provides the affidavit of his inmate legal assistant who swears Froebe did not testify regarding the past reliability of the informant. Regardless, Froebe testified that she was able to confirm in detail the information provided by the informant. Sufficient indicia of reliability and credibility were presented to the disciplinary committee that the use of information from a confidential informant in this case did not deny plaintiff due process within the circumstances presented.

III. Witness

Plaintiff complains that he was not allowed to present the testimony of his counselor. The committee chairman refused to allow this testimony after determining that plaintiff was seeking the name of the informant through his

testimony. The Supreme Court determined that prison officials should have considerable discretion in refusing to call witnesses due to the special nature of a prison disciplinary hearing. Wolff, 418 U.S. at 566-67, 94 S.Ct. at 2979-80, 41 L.Ed.2d at 956-57. Defendants' exercise of discretion was not a denial of due process.

IV. Extensions of Hearing

Again citing an Arizona Regulation, plaintiff asserts that extensions of his hearing date were granted improperly. Plaintiff has not established that there is a constitutional right to a hearing within seven days. Each of the three extensions granted was granted for good cause. Further, plaintiff has shown no prejudice as a result of the extensions. Plaintiff has not stated a claim of a constitutional magnitude.

V. Statement of Decision

Following a disciplinary hearing the factfinders must issue a written statement concerning the evidence relied on and the reasons for the disciplinary action. Wolff, 418 U.S. at 564, 94 S.Ct. at 2979, 41 L.Ed.2d at 956. Plaintiff was informed that he was "[f]ound guilty based on Reporting Officer Report and Testimony." Thus, plaintiff was cited to two bases for the committee's conclusions: Officer Froebe's report and Officer Froebe's testimony. The notice was sufficient under Wolff.

VI. Conclusion

Plaintiff's constitutional right to due process has not been violated. Although plaintiff states he has been denied equal protection of the laws, he does not allege that he has been treated

differently than others similarly situated; therefore, he has not stated an equal protection claim. Jones v. Helms, 452 U.S. 412, 101 S.Ct. 2434, 69 L.Ed.2d 118 (1981). Thus, defendants' Motion for Summary Judgment should be granted.

IT IS THEREFORE RECOMMENDED that defendants' Motion for Summary Judgment be granted.

The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate will be considered a waiver of a party's right to de novo consideration of the factual

issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to he Magistrate's recommendation. Further, the failure to timely file objections may be deemed a waiver of the right to appeal all issues of law.

DATED: September 8, 1986.

/s/Michael Mignella, Jr.
MICHAEL MIGNELLA, JR.
United States Magistrate

APPENDIX D

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentement or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution, Section One:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of te United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.